BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOSE A. GOMEZ	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 196,240 & 196,241
MONFORT, INC.	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant and respondent both appeal from an Award entered by Assistant Director Brad E. Avery on July 22, 1997. The Appeals Board heard oral argument January 14, 1998.

APPEARANCES

Claimant appeared by his attorney, Stanley R. Ausemus of Emporia, Kansas. Respondent appeared by its attorney, Alisa A. Nickel of Dodge City, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed the record listed in the Award and adopted the stipulations listed in the Award.

ISSUES

(1) Should benefits be limited to medical treatment only in accordance with K.S.A. 44-501(c) because claimant was not disabled for a period of one week from earning full wages? Respondent contends claimant was not disabled for one week because he was not off for five or more consecutive days and the time off was for medical treatment.

(2) What is the nature and extent of claimant's disability? The Assistant Director awarded claimant a 57 percent work disability based on a 60 percent task loss and a 54 percent wage loss. Claimant argues that the wage loss should be 100 percent and the work disability higher because claimant was not working or earning a wage.

Respondent, on the other hand, contends benefits should be based on functional impairment. First, respondent contends benefits should be limited to functional impairment on the basis of K.S.A. 44-510e(a) because claimant earned post-injury wages which were 90 percent or more of the pre-injury wage. As a part of this argument, respondent includes in the post-injury wage a lump sum payment respondent made in January of 1997 to bring the wages to 90 percent of the pre-injury wage. Respondent also asserts that the 90 percent post-injury wage should continue to be imputed to claimant after claimant left employment because claimant was terminated for cause. In the alternative, respondent argues the evidence does not show the amount of claimant's post-injury wage and claimant has the burden to show it was not 90 percent. Finally, respondent argues that the wage loss should be based on a comparison of hourly wage only, not including overtime or other income. According to respondent such a comparison would give claimant a post-injury wage 90 percent or more of his pre-injury wage.

If work disability is awarded, respondent contends it should be less than awarded by the Assistant Director. Respondent argues work disability should be allowed only for the period from the date of accident through January 30, 1997, when respondent paid what respondent described as back wages. The lump sum payment brought the total amount respondent paid claimant to 90 percent of the pre-injury wage. Respondent contends the period from the October 3, 1994, date of accident to January 30, 1997, is 121.71 weeks and this should be the maximum number of weeks for the work disability. Finally, respondent contends the Assistant Director erred when he did not consider Dr. C. Reiff Brown's second deposition, taken on December 18, 1996. According to respondent, Dr. Brown agrees with the task loss opinion of Ms. Karen Terrill. Ms. Terrill concluded claimant's task loss was less than the 60 percent found by the Assistant Director.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the evidence and considering the arguments, the Appeals Board concludes the award should be modified. The Board agrees with the findings and conclusions by the Assistant Director with the exception that the Board concludes the second deposition by Dr. Brown does give a credible medical opinion and provides probative evidence of claimant's task loss which should be given some weight. As a result, the Board concludes the award should be modified to a 49.5 percent work disability.

Findings of Fact

(1) Claimant suffered bilateral carpal tunnel injuries as a result of repetitive lifting and cleaning pieces of meat in the course of his employment with respondent. For the bilateral carpal tunnel injuries, the parties have stipulated to a date of accident of October 3, 1994.

(2) Claimant suffered injury to his cervical spine on October 31, 1994, (also a stipulated date of accident) when approximately 15 boxes fell onto his head in the course of his employment for respondent.

(3) The parties advised at the time of oral argument in this appeal they have stipulated that the bilateral carpal tunnel and cervical spine injuries be treated as one injury for purposes of this award.

(4) Claimant was seen and treated by Dr. Murati from October 11, 1994, through December 13, 1994. Claimant was also treated by Dr. Kenoyer beginning November 17, 1994. Dr. Kenoyer performed surgical release of both the right median and ulnar nerves on December 9, 1994, and surgical releases for the left median and ulnar nerves on January 13, 1995. Claimant was also treated, primarily for problems with his cervical spine, by Drs. Zeller, Eyster, and Brown during the months of February through September of 1995.

(5) Claimant did not, following his injuries, miss five consecutive days of work but did miss and was not paid for a total of eight full days and parts of six other days for medical treatment. Claimant was paid for time missed (one to two hours per day) on six additional days.

(6) After the onset of symptoms in his hands and wrists, claimant was transferred to work with hides for a period of approximately six months and then worked in cleanup for approximately one month. The hides work involved folding or rolling hides weighing between 80 and 100 pounds. The cleanup work required that he occasionally lift pieces of meat, weighing 50 to 80 pounds, that had fallen to the floor and required bending, twisting, and working in a flexed position.

(7) Claimant was terminated for cause effective April 21, 1995, after receiving more than four written warnings in a 12 month period. The warnings were for excessive tardiness, poor work performance, unexcused absence, failure to follow procedures for punching in and out, use of a non-employee entrance, and, finally, dishonesty and misuse of company time. The last warning, the one which triggered the termination, was given after claimant told workers compensation coordinator Roxana Garcia that his physical therapy appointment was at 11:00 when it was in fact at 11:30, and also gave the personnel director a false statement about why he left early. He told him he left early to get a windshield wiper for his car when, in fact, he got the wiper after the appointment and claimant took approximately one hour after his appointment before returning to work.

(8) Those records introduced by written stipulation show that at the time of claimant's termination he was earning $7.00 per hour. The record of overtime pay ends as of April 8, 1995, and claimant was not terminated until April 21, 1995. Also, the records show overtime for more than 26 weeks prior to April 8, 1995. The total overtime earned for the 26 weeks prior to April 8, 1995, was $33.69 for a weekly average of $1.30. Exhibit 3 to claimant's deposition shows a total earning, including overtime, for the 29 weeks from claimant's first injury to the date of his termination was $7,196.60 or an average of $248.16 per week.

(9) The Board finds respondent payed claimant a wage less than 90 percent of the stipulated pre-injury wage of $344.68 during the period from October 3,1994, the date of the first accident, to April 21, 1995, the date claimant was terminated.

(10) Respondent payed claimant a lump sum of $1,900 on January 30, 1997. If the $1,900 is counted as part of claimant's post-injury wage, claimant's post-injury wage in his employment for respondent would be 90 percent of his pre-injury wage.

(11) After respondent terminated claimant in April 1995, claimant worked for several other employers. With the exception of employment for Personnel Solutions, Inc., the pay records from the other employment show claimant earned less than 90 percent of the wage claimant earned working for respondent prior to his injuries. The records from Personnel Solutions show two checks totaling $1,007.50 but do not show the number of hours or the number of days or weeks worked and, therefore, do not permit calculation of the average weekly wage.

(12) At the time claimant last testified in this case, claimant was not working and was not earning a wage.

(13) Based on the testimony of vocational expert Karen Terrill, the Board finds claimant now has, after the injuries which are the subject of this case, the ability to earn 54 percent of the wage he earned in his employment for respondent.

(14) Dr. Brown recommended the following restrictions for the cervical spine injuries:

> He must permanently avoid work that would involve frequent flexion and extension of the spine greater than 45 degrees in either direction and frequent rotation to the right or left greater than 45 degrees. On the basis of the neck difficulty he should avoid frequent lifting above 60# occasionally, 40# frequently.

(15) Dr. Brown recommended the following restrictions for the carpal tunnel problems:

> He should permanently avoid frequent flexion and extension of the wrist greater than 45 degrees in each direction, pushing and pulling more than

> 40#, frequent grip as necessary, using the hands in lifting must be limited to 40# occasionally, 25# frequently. He also must avoid using hook and knife.

(16) The work claimant performed for respondent in hides and cleanup after the injury violated the restrictions recommended by Dr. Brown.

Conclusions of Law

(1) K.S.A. 44-501(c) limits benefits as follows:

> Except for liability for medical compensation . . . the employer shall not be liable under the workers compensation act in respect of any injury which does not disable the employee for a period of at least one week from earning full wages at the work at which the employee is employed.

The history of this statutory provision, as reflected in Osborn v. Electric Corp. of Kansas City, 23 Kan. App. 2d 868, 936 P.2d 297, *rev. denied* 262 Kan. ___ (1997), encourages the Board to give the provision as limited an application as reasonably consistent with the express language. The Board concludes unpaid time missed from work in order to obtain medical treatment is time claimant is disabled from earning a wage. The Board also concludes the time missed need not be consecutive days. In this case, claimant missed and was not paid for more than eight full days in order to obtain necessary medical treatment. The Board concludes claimant was disabled for more than the requisite period from earning full wages and is, therefore, eligible to receive permanent disability benefits. The Board also notes the claimant did not, after the injury, return to the same job he was performing at the time of the injury and earned less than he was at the time of the injury. Claimant was permanently disabled from earning full wages at the work he was employed in at the time of the accident. The requirements of K.S.A. 44-501(c) were, therefore, satisfied by the fact the injury prevented him from returning to the same job.

(2) K.S.A. 44-510e(a) sets out the following statutory definition of permanent partial general disability:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

(3) K.S.A. 44-510e(a) also provides that an employee who earns wages after the injury which are 90 percent or more of his or her pre-injury wage is not entitled to receive benefits in excess of the functional impairment.

(4) In Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995) the Court of Appeals held an employee who refuses to attempt offered employment at 90 percent or more of the pre-injury wage will also be limited to functional impairment.

(5) The Foulk decision and K.S.A. 44-510e(a) are construed in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997) as follows:

> In attempting to harmonize the language of K.S.A. 44-510e(a) with the principles of *Foulk*, we find the factfinder must first make a finding of whether a claimant has made a good faith effort to find appropriate employment. If such a finding is made, the difference in pre- and post-injury wages based on the actual wages can be made. This may lead to a finding of lesser wages, perhaps even zero wages, notwithstanding expert opinion to the contrary.
>
> If a finding is made that a good faith effort has not been made, the factfinder will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.

(6) The Board finds claimant's average weekly wage in the post-injury employment for respondent was $281.30. The Board has relied upon the records introduced with the written stipulation (filed with the Division October 4, 1996) which show claimant earned $7.00 per hour for a base wage of $280 and average overtime of $1.30 per week for the 26 weeks preceding April 8, 1995, the most recent 26-week period for which there is evidence in the record. Exhibit 3 to claimant's deposition might support a finding of a lower post-injury wage but the records submitted with the written stipulation provide a more specific basis for computing overtime. These latter records separate base pay from overtime as required under K.S.A. 44-511 for hourly employees.

(7) Claimant did not earn 90 percent of his pre-injury wage in his post-injury employment. The Board finds, as did the Assistant Director, that respondent's belated attempt, almost two years after claimant was terminated, to bring claimant's wage up to 90 percent by a lump sum payment does not comport with the legislature's intention in limiting benefits to functional impairment in cases where a claimant is earning 90 percent of the pre-injury wage. To satisfy that intention, the money must be paid as a wage, not as an attempt to retroactively limit benefits. The Board also has not, in reaching this conclusion, relied only on the hourly wage as respondent urges because the statute, K.S.A. 44-510e(a), refers to gross average weekly wage. Average weekly wage is defined in K.S.A. 44-511 and includes overtime and other compensation. To the extent possible, the Board has applied definitions from K.S.A. 44-511 to both the pre- and post-injury wage to make the comparison.

(8) Although claimant did not earn 90 percent of the pre-injury wage and is entitled to work disability, the Board concludes the wage factor of claimant's work disability should be based on the expert testimony of Ms. Terrill regarding claimant's wage earning ability. The Board considers it inappropriate in this case to impute the post-injury wage claimant was earning from respondent because the post-injury work violated the medical restrictions recommended by Dr. Brown, restrictions which the Board finds to be appropriate to claimant's injuries. Based on the principles enunciated in the Copeland decision, the Board also considers it inappropriate to use a 100 percent wage loss because claimant was terminated for cause from his employment with respondent. The Board, therefore, adopts the 54 percent wage earning ability expressed by Ms. Terrill.

(9) The Board finds the testimony by Dr. Brown in his second deposition, taken December 18, 1996, satisfies the requirement of K.S.A. 44-510e(a) that task loss be "in the opinion of the physician." Dr. Brown there agrees with the opinions of Ms. Terrill based on a list of tasks which defines the tasks differently than they are defined in a list provided by claimant's counsel.

(10) The Board concludes claimant has lost the ability to perform 45 percent of the work tasks he performed in the previous 15 years. This conclusion takes into consideration Dr. Brown's opinion, based on a task list provided by claimant (60 percent task loss), as well as the opinions of Dr. Brown based on a more detailed task list prepared by Ms. Terrill. Ms. Terrill has given separate opinions for the carpal tunnel and cervical injuries. To some extent the losses overlap, *i.e.*, the same task is eliminated by restrictions for both carpal tunnel and the cervical injury. She has also given separate opinions for two separate task lists, one based on claimant's description of the tasks and the other based on descriptions by the various employers. Based on claimant's description there were 46 tasks and one or both of the injuries would prevent claimant from performing 13 tasks for a 28 percent loss. Based on the employers' descriptions, there were 57 tasks and one or both of the injuries would prevent claimant from performing 21 of those tasks for a 37 percent loss. The Board has not relied on Ms. Terrill's opinions based on Dr. Eyster's restriction because those opinions were for the cervical injury only and were not approved or adopted by a physician as required by K.S.A. 44-510e(a).

(12) Claimant has a 49.5 percent work disability based on a 54 percent wage loss and a 45 percent task loss. K.S.A. 44-510e(a).

AWARD

WHEREFORE, the Appeals Board finds that the Award entered by Assistant Director Brad E. Avery, dated July 22, 1997, should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Jose A.

Gomez, and against the respondent, Monfort, Inc., for accidental injuries which occurred October 3, 1994, and October 31, 1994, and based upon an average weekly wage of $344.68 for 205.43 weeks at the rate of $229.80 per week or $47,207.81, for a 49.5% permanent partial work disability.

As of February 27, 1998, there is due and owing claimant 173.57 weeks of permanent partial general disability compensation at the rate of $229.80 per week or $39,886.39, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $7,321.42 is to be paid for 31.86 weeks at the rate of $229.80 per week, until fully paid or further order of the Director.

The Appeals Board approves and adopts all other orders by the Assistant Director not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of February 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Emporia, KS
Alisa A. Nickel, Dodge City, KS
Kenneth S. Johnson, Administrative Law Judge
Philip S. Harness, Director